

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JOSE TAMAYO-MARTINEZ §
v. § CIVIL ACTION NO. 6:09cv364
UNITED STATES OF AMERICA § (Crim. No. 6:05cr46)

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Movant Jose Tamayo-Martinez, proceeding *pro se*, filed this motion to vacate or correct sentence under 28 U.S.C. §2255 complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Tamayo-Martinez was convicted of money laundering and bulk cash smuggling, receiving concurrent 60 month and 70 month sentences. He did not initially take a direct appeal, but sought Section 2255 relief on January 29, 2007. Tamayo-Martinez v. United States, civil action no. 6:07cv50. This petition was dismissed in part based upon Tamayo-Martinez's waiver of appeal, and Tamayo-Martinez was allowed to take an out-of-time appeal. This appeal was dismissed on December 29, 2008.

Tamayo-Martinez signed the present motion to vacate on July 29, 2009. He raises various arguments concerning his original conviction and one claim that he received ineffective assistance of counsel in his out of time direct appeal.

After review of the pleadings, the Magistrate Judge issued a Report on August 27, 2009, recommending that the petition be dismissed. The Magistrate Judge concluded that all of Tamayo's claims which concerned his original conviction were successive, and that his claim of

ineffective assistance of counsel on direct appeal, which was not successive because it could not have been raised in the first Section 2255 motion, was without merit on its face. The Magistrate Judge also recommended that Tamayo-Martinez be denied a certificate of appealability *sua sponte*.

A copy of this Report was sent to Tamayo-Martinez at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this case and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled motion to vacate or correct sentence be and hereby is DISMISSED with prejudice as to Tamayo-Martinez's claim that he received ineffective assistance of counsel on appeal, and DISMISSED with prejudice on all of the remaining claims until such time as he secures permission from the Fifth Circuit Court of Appeals to file a successive petition under 28 U.S.C. §2255. It is further

ORDERED that the Movant Jose Tamayo-Martinez is hereby denied a certificate of appealability *sua sponte*. The denial of this certificate of appealability shall not prevent Tamayo-Martinez from seeking permission to file a successive petition, or from pursuing his claims upon receipt of such permission. Finally, it is

ORDERED that any and all other motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 5th day of October, 2009.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS".

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**